Supreme Court, U.S.
FILED

No. 95-1170 JAN 22 1996

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In The

Supreme Court of the United States

October Term, 1995

WILLIAM EVANS,

Petitioner,

vs.

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Does Title VII protect an employee from retaliation based upon his complaints that those under his professional care were being made victims of race-based discrimination?

2. Does an employee have standing to be protected under 42 U.S.C. § 1981 from retaliation based on complaints of racial discrimination in the work place not directed at fellow employees?

LIST OF ALL PARTIES

1. Petitioner, who was plaintiff and appellant below, is William Evans, former employee of Respondent.

2. Respondent, who was defendant and appellee below, The School District of Kansas City, Missouri.

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2. The Eighth Circuit Decision that Petitioner's Complaints of racial discrimination directed at his Black students were not complaints protected from retaliation under 42 U.S.C. § 1981 because he lacked standing is contrary to other Circuits' Decisions and this Court's interpretation of Civil Rights laws and has so departed from the accepted and usual course of the interpretation of 42 U.S.C. § 1981 that it undermines traditional Civil Rights Protection 8

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OPINION BELOW

The opinion sought to be reviewed is found at *Evans v. Kansas City, Missouri School District*, 66 EPD § 43,673 (8th Cir. 1995), ___ F.3rd ___. That decision reversed the U.S. District Court for the Western District of Missouri, Western Division's decision found at 861 F.Supp. 851 (W.D. Mo. 1994).

GROUNDS FOR JURISDICTION

The date of the opinion/judgment of the United States Court of Appeals for the Eighth Circuit of which this petition seeks review is September 6, 1995.

On the 24th of October, 1995, petitioner's timely Petition for Rehearing and Suggestions for Rehearing En Banc was denied. This Petition for a Writ of Certiorari has been filed within ninety days of that date.

The statutory authority for this court to review the judgment by way of Petition for Writ of Certiorari is found at 28 U.S.C. § 1254(1).

STATUTORY PROVISION

42 U.S.C.S. § 2000e-3. OTHER UNLAWFUL EMPLOYMENT PRACTICES

> a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or

> applicants for employment, for an employment agency or joint labor-management committee, controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title [42 USCS §§ 2000e-17].

42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

After teaching as a substitute for several years in Omaha, Nebraska, William Evans (Black) was offered a position as a band and choir teacher at Southeast High School in Kansas City, Missouri in August 1988. Evans continued in that position until June 30, 1991. Each year prior to his non-renewal, including his last year, Evans was reviewed as warranting renewed employment.

Evans' evaluation for the 1990-91 school year, indicated he met the requisite performance standards in all categories, including those related to the alleged reason given for his non-renewal, inadequate "planning".

In January 1991, Dr. Curtis Cooper became principal of Southeast High. Southeast was to become a magnet school with a focus on health professions and international studies as part of the remedial desegregation decree under which the District was operating. Doctor Cooper was brought in as principal in part because he had been involved in administering similar magnet school programs in California. At his first staff meeting, where the staff was encouraged to share their views, Dr. Cooper expressed his views on how the school could increase its non-minority student population and achieve its magnet goals. Dr. Cooper stated that the staff would be required to assist in implementing the magnet program and diversifying the student body.

Evans spoke up at the meeting, criticizing Dr. Cooper's plan as disregarding the needs of the incumbent Southeast student body, which was more than 98% Black. Evans also took issue with Dr. Cooper's statement that he hoped that Southeast would become a "Camelot", deeming it a racially insensitive remark. Evans asserts that following the voicing of his complaints, Dr. Cooper began discriminating against him through frequent visits to his classroom and criticism of his teaching skills. Dr. Cooper then began to require long and short-term lesson plans from Evans, despite the fact that no other teachers were

required to submit short-term plans.[1] Evans subsequently filed several complaints with the teachers' union about the requirement that he prepare lesson plans, alleging retaliation and race discrimination directed toward him. In April 1991, following Dr. Cooper's recommendation, the school board voted to not renew Evans' teaching contract for the 1991-92 school year.[2]

Evans filed suit, alleging race discrimination and unlawful retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.* The State law and section 1981 claims were submitted to a jury following a four day trial, with the Title VII claims reserved for the bench. The jury found in favor of the School District on the race discrimination claims, but found in favor of Evans on the retaliation claims. The District Court similarly found for Evans on the retaliation claims and against him on his race discrimination claims. Evans was awarded $25,002 in damages and reinstatement to a teaching position. *Evans v. School Dist. of Kansas City, Mo.*, 861 F.Supp. 851 (W.D. Mo. 1994).

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[1] Dale Hudson, a White male, was also eventually required to submit lesson plans to Dr. Cooper, but this requirement was instituted only after Evans' complaints about disparate treatment.

[2] Doctor Cooper himself resigned effective June 30, 1993, after being told that his contract would not be renewed, this as a result of protests by certain of the Black students and their parents. Cooper testified that he considered Evans' actions and the Black community involvement to be part of a conspiracy to replace White principals like himself with Black principals.

On the 6th of September, 1995, the United States Court of Appeals for the Eighth Circuit reversed the District Court's Decision. The Eighth Circuit indicated that the complaints raised by Evans, a teacher, concerning the treatment of his Black students were not the type of complaints protected from retaliation under Title VII (42 U.S.C. § 2000e *et seq.*) and that Evans did not have standing under 42 U.S.C. § 1981 to seek protection from retaliation.

On the 24th of October, 1995, Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

At the core of the case herein is the issue of whether there is protection from employer retaliation available to an employee who complains in a non-disruptive manner about racist treatment on the job; whether that racist treatment be directed at employees or others associated with the job.

I. THE EIGHTH CIRCUIT DECISION THAT PETITIONER'S NON-DISRUPTIVE COMPLAINTS ABOUT THE MISTREATMENT OF HIS STUDENTS BASED UPON THEIR RACE WAS NOT PROTECTED UNDER TITLE VII IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN WRIGHTEN VS. METROPOLITAN HOSPITALS, INC., WHICH FOUND THAT AN EMPLOYEE'S EMPLOYMENT RIGHT TO COMPLAIN ABOUT THE RACIALLY INSPIRED MISTREATMENT OF MINORITY PERSONS UNDER THEIR PROFESSIONAL CARE ARE COMPLAINTS PROTECTED FROM RETALIATION UNDER TITLE VII.

The Eighth Circuit Decision that petitioner's non-disruptive[3] complaints about the racially inspired mistreatment of his students was not protected under Title VII is directly contrary to the Ninth Circuit's Decision in *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984). See also *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 (2nd Cir. 1989). In *Wrighten* the Ninth Circuit held that complaints by professionals who complained that persons under their care were being mistreated due to their race was protected activity. The reasoning there was that to do otherwise would discourage employees from speaking out about racism in the work place.

In *Wrighten* a Black nurse repeatedly complained about what she thought to be mistreatment of the Black

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[3] No evidence was offered at trial to indicate that Evans' complaints were the type of disruptive complaints found in the *Booker v. Brown and Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989) case cited in the 8th Circuit decision.

patients under her care, as well as discrimination directed at her because of her complaints *and* her race. Those complaints included going public once her internal complaints went unheeded.

The *Wrighten* decision went on to emphasize the importance of a professional employee's duty to those in her care as an aspect or condition of employment and that as such carrying out one's duties with respect to minority members should not be an area lacking in protection from retaliation.

> Wrighten did not impede the goals of Emanuel by advocating good patient care. She did not abuse her duty as a nurse by advocating the needs of her patients. Patient advocacy by a nurse does not necessarily remove one from the protection of § 2000e. *Wrighten*, at p. 1356.

The Eighth Circuit Decision at issue here, however, stands for quite the contrary proposition, despite very similar fact patterns, including the fact that Evans herein also complained about disparate treatment directed at him because of his race following his complaint about his Black students' treatment. The Eighth Circuit decision indicates that simply by voicing a complaint on behalf of non-employees under his charge, albeit a race related complaint, an employee's rights to be protected from subsequent illegal retaliation based on protected acts are thereafter terminated.

> Here, however, the *genesis* of Evans' claims lies not with any allegation of a discriminatory employment practice, but rather with an allegation that Doctor Cooper's efforts to comply with a desegregation directive disregarded the needs

of the Black student population of Southeast. (Emphasis added, Appendix pp. 4-5)

II. THE EIGHTH CIRCUIT DECISION THAT PETITIONER'S COMPLAINTS OF RACIAL DISCRIMINATION DIRECTED AT HIS BLACK STUDENTS WERE NOT COMPLAINTS PROTECTED FROM RETALIATION UNDER 42 U.S.C. § 1981 BECAUSE HE LACKED STANDING IS CONTRARY TO OTHER CIRCUITS' DECISIONS AND THIS COURT'S INTERPRETATION OF CIVIL RIGHTS LAW AND HAS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF THE INTERPRETATION OF 42 U.S.C. § 1981 THAT IT UNDERMINES TRADITIONAL CIVIL RIGHTS PROTECTION.

The Eighth Circuit decision that petitioner lacked standing to raise a claim under 42 U.S.C. § 1981 following his discharge for complaining about the treatment of his Black students contradicts decisions from the Second Circuit and Fifth Circuit.

The Eighth Circuit decision herein holds that protection under 42 U.S.C. § 1981 does not extend to a Black employee complaining of racial discrimination directed at others who are not fellow employees (Appendix p. 6). However, in *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2nd Cir. 1975), modified on other grounds, 520 F.2d 409 (2nd Cir. 1975) the Second Circuit found that a claim was proper under § 1981 where a White employee claimed his company forced him into premature retirement solely because he sold his house, located in a neighborhood inhabited primarily by White company employees, to a Black fellow employee. Likewise in *Faraca v. Clements*, 506

F.2d 956 (5th Cir. 1975), cert. denied, 422 U.S. 1006, 95 S.Ct. 2627, 45 L.Ed.2d 669 (1975) the Fifth Circuit allowed suit under 42 U.S.C. § 1981 where a White teacher was denied a job because he was married to a Black woman.

Under the Eighth Circuit's rationale a Black person complaining similarly of mistreatment of Blacks other than himself in non-employment situations would *not* be similarly protected from retaliation. Such a scenario is not only directly at odds with the Second Circuit's *DeMatteis* and the Fifth Circuit's *Faraca* decisions, but also with this Court's rationale in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). In an analogous situation this Court in *Sullivan v. Little Hunting Park,* upheld a 42 U.S.C. § 1982 suit by a White landowner who was expelled from a residential community park organization for having assigned his part interest to his Black tenant. Therein this court stated:

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982.
>
> . . .
>
> Under the terms of our decision in *Barrows,* there can be no question but that Sullivan has standing to maintain this action. At 24 L.Ed. 2d 392-393.

The Eighth Circuit in its decision herein however essentially rejects this Court's enunciated principle.

> Evans, however, is not the proper plaintiff to bring such an action on behalf of the students.

> The rights of the student body in such a situation must be asserted by an individual whose rights are directly affected by the challenged action, i.e., a student or parent of a student. (Appendix p. 6.)

In each of the aforecited cases, had the Eighth Circuit's rationale regarding "standing" been followed, the decisions would be in error. In each case "standing" would be lacking because in each situation, although the plaintiff therein was ultimately victimized by the defendant's actions, those actions by the defendant against the plaintiff only arose as a result of the plaintiff's having initially championed the cause of others not in his class.

CONCLUSION

In conclusion, the decision at issue here places in serious jeopardy rights of all employees who seek to perform the duties of their job in an orderly and satisfactory manner while also speaking out when confronted with racial discrimination directed at those around them; whether they be fellow employees, or as in this case, young students under the petitioner's charge, care and protection.

For this reason the petitioner respectfully requests that this Court should issue a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit cited herein.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1340

William Earl Evans, Plaintiff/Appellee, v. The Kansas City, Missouri School District; Defendant/Appellant, American Federation of Teachers, Local 691, Defendant.	*	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 14, 1995

Filed: September 6, 1995

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Senior Circuit Judge.

WOLLMAN, Circuit Judge.

The Kansas City School District Appeals from the judgment entered on a finding that it unlawfully retaliated against William E. Evans in refusing to renew his teaching contract for the 1991-92 school year. We reverse.

I.

After teaching as a substitute for several years in Omaha, Nebraska, Evans was offered a position as a band and choir teacher at Southeast High School in August 1988. Evans continued in that position until June 30, 1991. Each year prior to his non-renewal, Evans was reviewed as warranting renewed employment.

In January 1991, Dr. Curtis Cooper became principal of Southeast High. Southeast was to become a magnet school with a focus on health professions and international studies as part of the remedial desegregation decree under which the district was operating. *See Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1986) (subsequent history omitted). Doctor Cooper was brought in as principal in part because he had been involved in administering similar magnet school programs in California. At his first staff meeting, Dr. Cooper expressed his views on how the school could increase its non-minority student population and achieve its magnet goals. Doctor Cooper stated that the staff would be required to assist in implementing the magnet program and diversifying the student body.

Evans spoke up at the meeting, criticizing Dr. Cooper's plan as disregarding the needs of the incumbent Southeast student body, which was more than 98% black. Evans also took issue with Dr. Cooper's statement that he hoped that Southeast would become a "Camelot," deeming it a racially insensitive remark. Evans asserts that following the voicing of his complaints, Dr. Cooper began discriminating against him through frequent visits to his classroom and criticism of his teaching skills. Doctor

Cooper then began to require long and short-term lesson plans from Evans, despite the fact that no other teachers were required to submit short-term plans.[1] Evans subsequently filed several complaints with the teachers' union about the requirement that he prepare lesson plans. In April 1991, following Dr. Cooper's recommendation, the school board voted to not renew Evans' teaching contract for the 1991-92 school year.[2]

Evans filed suit, alleging race discrimination and unlawful retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.* The state law and section 1981 claims were submitted to a jury following a four day trial, with the Title VII claims reserved for the bench. The jury found in favor of the school district on the race discrimination claims, but found in favor of Evans on the retaliation claims. The district court similarly found for Evans on the retaliation claims and against him on his race discrimination claims. Evans was awarded $25,002 in damages and reinstatement to a teaching position. *Evans v. School Dist. of Kansas City, Mo.*, 861 F. Supp. 851 (W.D. Mo. 1994).

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[1] Dale Hudson, a white male, was also eventually required to submit lesson plans to Dr. Cooper, but this requirement was instituted after Evans' initial complaints.

[2] Doctor Cooper himself resigned effective June 30, 1993, after being told that his contract would not be renewed, this as a result of protests by certain of the black students and their parents.

II.

The school district contends that Evans cannot recover on his retaliation claims because his conduct was not protected by Title VII, section 1981, or the Missouri Human Rights Act.[3] To establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in statutorily protected activity; (2) an adverse employment action; and (3) a causal connection between the adverse employment action and the protected activity. *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). Title VII provides that an employer may not discriminate against an employee on the basis that the employee "has opposed any practice made an unlawful employment practice." 42 U.S.C. § 2000e-3(a). Thus our initial inquiry turns on whether the school district had engaged in any "unlawful employment practice," Evans' opposition to which was statutorily protected.

To demonstrate the presence of protected opposition, a plaintiff must show a good faith reasonable belief that his employer engaged in a discriminatory employment practice. *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (subsequent history omitted); *see Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980). Here, however, the genesis of Evans' claims lies not with any allegation of a discriminatory employment practice, but

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[3] The Missouri Human Rights Act and Title VII apply the same analysis to the retaliation claim. *See Sweeney v. City of Ladue*, 25 F.3d 702, 703 (8th Cir. 1994); *Finley v. Empiregas, Inc.*, 975 F.2d 467, 473 (8th Cir. 1992).

rather with an allegation that Doctor Cooper's efforts to comply with a desegregation directive disregarded the needs of the black student population of southeast. Rather than relating to the terms and conditions of Evans' employment, this initial protest at the staff meeting in which Dr. Cooper unveiled his plan for the school pertained to Evans' conflicting vision for the school. Title VII is not a "bad acts" statute. *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989) (subsequent history omitted). Doctor Cooper's directives to the faculty and staff of Southeast related to concerns about the school's responsibility to the student body and not to employment practices. *See id.; see also Jamil v. Secretary of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (opposition to employer action not constituting an employment practice is unprotected under Title VII).

Doctor Cooper's announced course of action with respect to the magnet school program reflected his intention to comply with the district court's desegregation order. Evans was aware of the desegregation order and magnet program, and thus he cannot avoid scrutiny of his claims by relying on an asserted reasonable belief that his allegations were justified. To the extent that Evans claims a belief that he and the rest of the staff would be required to discriminate, such a belief was simply unfounded and unreasonable in the light of the district court's sweeping desegregation order. Evans could not reasonably believe that the faculty would be excused from complying with a lawfully required directive.

Some racial tension apparently existed among the faculty before Dr. Cooper came on board, and Evans expressed concern that Dr. Cooper's plans would not

only weaken the strong African American heritage of Southeast but would also further fragment the staff. Such a concern adds nothing to the claim of unlawful employment action, however, because Dr. Cooper's proposed course of action was in direct conformity with the desegregation order. Likewise, the innocuous reference to "Camelot," given the school's tradition and symbolism, fails to establish Evans, claims as reasonable. Whatever ill-will Dr. Cooper displayed towards Evans as a result of Evans' complaints is simply not remediable under Title VII.

III.

Although "[s]ection 1981 has no specific retaliation provision," *Sisco,* 655 F.2d at 150, we have recognized that it does encompass "allegations of retaliatory conduct" in a racial discrimination context. *Setser v. Novack Inv. Co.,* 638 F.2d 1137, 1147 (8th Cir. 1981) (subsequent history omitted); *see Sisco,* 655 F.2d at 150. Evans has failed, however, to sufficiently establish this claim as well.

Much of the analysis of a retaliation claim under section 1981 is similar to that under Title VII. Evans argues, however, that section 1981 is broader and encompasses actions that do not fall within the rubric of the employment relationship. Evans, however, is not the proper plaintiff to bring such an action on behalf of the students. The rights of the student body in such a situation must be asserted by an individual whose rights are directly affected by the challenged action, i.e., a student or parent of a student. *See Mackey v. Nationwide Ins. Co.,* 724 F.2d 419, 421-22 (4th Cir. 1984). Evans' opposition to

Dr. Cooper's plans for complying with the district court's desgregation [sic] order cannot by any stretch of the imagination be equated with the filing of a lawsuit alleging the physical abuse of prisoners, held in *Womack* to be a protected activity. Accordingly, Evans fails to satisfy the requirements of section 1981 in the same manner that he has failed to satisfy Title VII and the Missouri Human Rights Act.

IV.

A school's principal is so called because of the authority vested in that position. Evans' dissatisfaction with the manner in which the district court's remedial decree was to be complied with was not protected activity. The authority of the principal and the school administration would be seriously undermined if members of the staff were able to contest every administrative action that struck a dissonant note with their personal views. "An employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989). Here, no matter how one approaches this case, Evans "was not contesting any unlawful employment practice; he was contesting the correctness of a decision made by his employer." *Id.* at 1313. Whatever rights Evans may have had under the provisions of state law governing nonrenewal of teacher contracts, they do not rise to the level of a claim under Title VII, section 1981, !or the Missouri Human Rights Act.

The judgment is reversed, and the case is remanded to the district court with directions to dismiss the complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1340WMKC

William Earl Evans, Appellee, vs. The Kansas City, Missouri School District, Appellant.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 24, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

WILLIAM E. EVANS, Plaintiff,	)	
vs.	)	No. 92-0630-CV-W-3
THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,	)	(Filed Aug. 25, 1994)
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This is a case of race discrimination and retaliation brought pursuant to Title VII, 42 U.S.C. § 1981, and the Missouri Human Rights Act (MHRA). In a trial commencing June 13, 1994, the Section 1981 and MHRA claims were tried to a jury and the Title VII claim was tried to the Court. The jury returned a verdict in favor of the Plaintiff William E. Evans ("Evans") on the retaliation claim for $25,002.00 and in favor of defendant The School District of Kansas City Missouri ("School District") on the race discrimination claim.

The Court now finds that Plaintiff also was discriminated against in the form of illegal retaliation pursuant to Title VII. This finding is made of the Court's own independent view of the facts, although on common issues of fact, the Court is bound by the jury's findings.[1] *See Fray v.*

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[1] Pursuant to the parties, agreement before trial, all legal and equitable claims in the above-styled action were tried together to a jury. The parties further agreed that the jury's verdict would govern the factual issues common to all claims.

Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992); *Jiles v. Ingram*, 944 F.2d 409, 413 (8th Cir. 1991). This Court's findings of fact and conclusions of law follow.

I. CONCLUSIONS OF LAW

This Court has jurisdiction over Plaintiff's Title VII claim pursuant to 42 U.S.C. § 2000e-5(f). Venue is proper in this district pursuant to 28 U.S.C. § 1391.

Plaintiff Evans was an employee of Defendant School District as that term is defined by Title VII. Defendant is an employer within the meaning of that term as provided by Title VII. Plaintiff has satisfied all statutory prerequisites for bringing this Title VII civil action.

II. FINDINGS OF FACT

Evans is an adult African-American male. He received his bachelor's degree in 1985 and became licensed to teach in the State of Tennessee that same year. After working as a substitute teacher for several years, the School District employed Evans in August 1988. The School District assigned Evans to Southeast Magnet High School as a music teacher.

In January 1991, Dr. Curtis Cooper ("Cooper") was employed by the School District as principal of Southeast Magnet High School. At Cooper's first developmental staff meeting with teachers and administrators, Cooper presented his vision and plans for the school to the staff. Plaintiff took exception to several of Cooper's remarks as racially insensitive and openly criticized them as such during the meeting.

On March 6, 1991, Cooper directed Evans to submit both long and short-term lesson plans to him by March 8, 1991. Cooper did not direct any other teacher to submit short-term lesson plans at that time. Upon receiving Cooper's request for lesson plans, Evans wrote a memorandum dated March 8, 1991, to Cooper in which he charged Cooper with race discrimination and harassment based on Evans, criticisms of Cooper at the developmental meeting. Evans subsequently complained to the association representing the School District teachers, the American Federation of Teachers (AFT), about Cooper's requirement that he submit short-term lesson plans.

On March 21, 1991, a meeting took place between Evans, Cooper, and Kathleen Reed ("Reed"), Plaintiff's union representative, for the purpose of discussing Cooper's directive that Evans submit weekly lesson plans. In April 1991, the School Board voted not to renew Evans' teaching contract for the following year although Plaintiff's Teacher Performance Evaluations for all three years of service at Southeast High School reveal an overall performance that met requisite performance standards. Further, Plaintiff's Evaluation for the period from November 19, 1990, through January 11, 1991, three months before he was notified his contract would not be renewed, indicates he met the requisite performance standards in both planning and classroom management.[2]

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[2] Although there is no specific category on the Kansas City, Missouri Teacher's Performance Evaluation for "classroom management," the Court concludes that the categories of "student relationships" and "climate" encompass the concept of classroom management. Plaintiff has consistently met the School District's performance standards in these two areas over the last three years.

Notably, the School District alleges non-renewal of Evans' employment was based on failure to plan and insubordination, while Plaintiff asserts that non-renewal was a result of his race as well as retaliation for his complaints concerning the School District's racially discriminatory and insensitive treatment of its black students and staff.

III. RACIAL DISCRIMINATION

As a preliminary matter, Section 703(a)(1) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). The United States Supreme Court has outlined a framework for the orderly presentation and evaluation of evidence in discrimination cases such as the one here: (1) plaintiff must establish a prima facie case which then raises a rebuttable presumption of unlawful discrimination; (2) defendant must then rebut the presumption by articulating a legitimate, non-discriminatory reason for the employment decision; and (3) once the defendant meets this burden, plaintiff must

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The only area in which Plaintiff failed to meet the requisite performance standard in any area over the course of his three years with the School District was on one occasion, in the area of organization.

then prove by a preponderance of the evidence that defendant's proffered reason was not the real reason but merely a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

The Supreme Court has recently modified this framework in that solely establishing a defendant's proffered reason was pretextual neither compels nor guarantees a verdict in favor of the plaintiff unless the trier of fact further makes a finding of unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

A. The Prima Facie Case

A plaintiff may establish a prima facie case of intentional discrimination by showing "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and, the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802.[3]

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[3] "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that [he] applied for an available position, for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253.

In light of the above-found facts, this Court **CONCLUDES** that Plaintiff established a prima facie case of race discrimination.

B. Race-Neutral Reason for Failure to Hire

Once the plaintiff establishes a prima facie case, defendant must "articulate some legitimate, non-discriminatory reason for the employee's rejection." *Burdine*, 450 U.S. at 252-53. Put another way, the defendant must clearly set forth reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Hicks*, 113 S. Ct. at 2749.

At trial, the School District introduced as evidence several written reprimands from Cooper to Evans for failure to comply with Cooper's directive to provide him copies of short-term lesson plans. (Plaintiff's Exhibits 8, 11, 12, and 15). Further, the School District introduced into evidence at trial a written reprimand from Cooper to Evans for insubordination. (Plaintiff's Exhibit 14). Based on this evidence, the School District contends that the legitimate, non-discriminatory reasons for refusing to renew Plaintiff's teaching contract were that (1) he failed to plan properly for instruction in the classroom; (2) he refused to submit weekly lesson plans repeatedly requested by the principal; and (3) he demonstrated flagrant disrespect and contempt for the authority of his supervisor. This Court finds that the School District has supplied sufficient evidence of non-discriminatory reasons for choosing not to renew Plaintiff's contract.

In light of the above-found facts, this Court **CONCLUDES** that the Defendant successfully rebutted Plaintiff's prima facie case.

C. Pretext

Once the defendant successfully rebuts plaintiff's prima facie case, plaintiff must then prove by a preponderance of the evidence that defendant's proffered reason was not the real reason, but merely a pretext, for discrimination. *Burdine*, 450 U.S. at 252-53. Plaintiff asserted at trial that the School District's grounds for refusing to renew his contract are pretextual because he consistently met requisite performance standards in planning and classroom management over the course of his three years at Southeast High School. In support of this assertion, Plaintiff introduced into evidence his Teacher Performance Evaluations, including his Evaluation for the period from November 19, 1990, through January 11, 1991, just two months before he was requested to submit weekly lesson plans based on alleged inadequacies, and only three months before he was notified his contract would not be renewed due to poor planning and classroom management. The fact that the principal of the school would demand lesson plans from Plaintiff for substandard performance after three years of consistent and satisfactory evaluations and just two months after a formal evaluation reflecting satisfactory performance, and the fact that the School District would subsequently refuse to renew Plaintiff's teaching contract for this substandard performance the following month, both support a finding that the School District's claims of substandard performance are pretextual.

In addition to poor planning and classroom management, Defendant presented evidence, through the testimony of Cooper, that Plaintiff was insubordinate. Cooper testified that Plaintiff was insubordinate first, when Plaintiff failed to submit requested lesson plans, and second, when Plaintiff displayed disrespect for Cooper by directing profanity at him after the March 21, 1991, meeting that took place between Evans, Cooper, and Reed for the purpose of discussing Cooper's order that Evans submit weekly lesson plans. As a result, the School District asserts insubordination is also a legitimate non-discriminatory reason for refusing to renew Plaintiff's teaching contract.

Notably, Reed's testimony at trial directly contradicts Cooper's testimony. Reed testified that, although she was present at the end of the meeting and standing near Cooper, she never heard Evans speak the alleged profanity. Reed further testified that in this meeting, held approximately three weeks before the School District refused to renew Plaintiff's teaching contract, Cooper voluntarily withdrew his request for Plaintiff's short-term lesson plans based on Reed's advice that he could not target just one teacher in this request. This Court finds Reed's testimony both credible and persuasive, giving support to the finding that the School District's claim of insubordination is also pretextual.

Based on the above discussion, this Court **CONCLUDES** that Plaintiff has successfully shown by a preponderance of the evidence that Defendant's proffered reasons of substandard performance and insubordination were not the real reasons for failure to renew Plaintiff's contract, but merely a pretext for discrimination.

D. Plaintiff's Ultimate Burden of Proof

In light of the Supreme Court's recent decision in *Hicks*, even though Plaintiff has succeeded in proving by a preponderance of the evidence that the School District's articulated non-discriminatory reasons for failing to renew his contract were pretextual, Plaintiff still has the ultimate burden of persuading the trier of fact that the decision not to offer him a contract was racially motivated. *Hicks*, 113 S. Ct. at 2749. Absent a finding of unlawful discrimination by the trier of fact, Plaintiff cannot prevail. *Id.*

Evans supplies no additional evidence that the School District's decision not to offer him a new contract was based on discrimination. His prima facie case, standing alone, is not sufficient to carry the day. In light of this finding, Evans has failed to prove, and this Court cannot find, that the decision not to offer him a new contract was motivated by race as required by *Hicks*. *Id.* Accordingly, Plaintiff is not entitled to judgment in his Title VII racial discrimination claim.

IV. RETALIATION

In his second Title VII claim, Plaintiff alleges that the School District refused to renew his teaching contract in retaliation for Plaintiff's complaints concerning the School District's racially discriminatory and insensitive treatment of its black students and staff.

Section 704(a) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter.

42 U.S.C. § 2000e-3(a). This Court notes that the Eighth Circuit Court of Appeals applies the same order and allocation of proof to those cases alleging retaliation for participation in Title VII processes as it does for Title VII intentional discrimination suits. *See Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981) (citations omitted). Therefore, once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to produce some legitimate nondiscriminatory reason for the adverse employment decision. *See id.* If the employer satisfies the burden, the plaintiff must prove by a preponderance of the evidence that the proffered reason is a pretext for retaliation. *See id.* Further, plaintiff must finally persuade the trier of fact that the decision not to offer him a contract was racially motivated. *Hicks*, 113 S. Ct. at 2749.

A. The Prima Facie Case

To establish a prima facie case of retaliatory discrimination a plaintiff must show: (1) he engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action. *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989); *McDaniel v. Temple Independent School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985).

The Title VII prohibition against retaliatory discrimination protects activities ranging from the filing of a formal complaint to expressing a belief that the employer has engaged in discriminatory practices. *See, e.g., Wentz,* 869 F.2d at 1153; *Wrighten v. Metropolitan Hospitals, Inc.,* 726 F.2d 1346 (9th Cir. 1984); *Womack v. Munson,* 619 F.2d at 1292; *Berg v. La Crosse Cooler Co.,* 612 F.2d 1041 (7th Cir. 1980); *Coleman v. Wayne State University,* 664 F. Supp. 1082 (E.D. Mich. 1987). Plaintiff asserts that his teaching contract was not renewed in retaliation for complaints about the School District's racially discriminatory and insensitive treatment of its black students *and staff* to Cooper. *See* Plaintiff's Amended Complaint at p.3, ¶ 9 (emphasis added). Based on the cited authority and the nature of Plaintiff's grievance as it relates to his working conditions, this Court holds that Plaintiff's complaint to the School District regarding its racially discriminatory and insensitive treatment of black students and staff meets the requisite showing that he engaged in activity protected by Title VII. Further, Plaintiff has met the second prong of the prima facie retaliation case because nonrenewal of Plaintiff's teaching contract qualifies as an adverse employment action.

Lastly, this Court finds a causal connection existed between participation in the protected activity and the adverse employment action. The requisite causal link is more than established by the closeness in time between Plaintiff's complaints and the institution of Cooper's campaign of "reprimands." *Kralowec v. Prince George's County,* 503 F. Supp. 985 (D. Md. 1980), *aff'd. mem.* 679 F.2d 883 (4th Cir.), *cert. denied,* 459 U.S. 872 (1982); *Goodwin v. Pittsburgh,* 480 F. Supp. 627 (W.D. Pa. 1979), *aff'd.*

mem. 624 F.2d 1090 (3d Cir. 1980). A causal connection may be demonstrated indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time. *See Rath v. Selection Research. Inc,* 978 F.2d 1087, 1090 (8th Cir. 1992); *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989).

In light of the above-found facts, this Court **CONCLUDES** that Plaintiff has carried his initial burden in establishing a prima facie case of retaliation.

B. Race-Neutral Reason for Failure to Hire

Again, once the plaintiff establishes a prima facie case, defendant must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Burdine,* 450 U.S. at 252-53. Based on the discussion in Section IB, *supra,* this Court again finds that the School District articulated legitimate, nondiscriminatory reasons for refusing to renew Plaintiff's teaching contract. In light of this finding, this Court **CONCLUDES** that the School District successfully rebutted Plaintiff's prima facie case of retaliation.

C. Pretext

Once the defendant successfully rebuts plaintiff's prima facie case, plaintiff must then prove by a preponderance of the evidence that defendant's proffered reason

was not the real reason, but merely a pretext for discrimination. *Burdine,* 450 U.S. at 252-53. Based on the discussion in Section IC, *supra,* this Court again finds that the Plaintiff has proved by a preponderance of the evidence that Defendant's proffered reasons of substandard performance and insubordination were not the real reasons for failure to renew Plaintiff's contract, but merely a pretext for discrimination.

D. Plaintiff's Ultimate Burden of Proof

As the Court identified in Section ID, *supra,* although Plaintiff has succeeded in proving by a preponderance of the evidence that the School District's articulated nondiscriminatory reasons for failing to renew his contract were pretextual, Plaintiff still has the ultimate burden of persuading the trier of fact that the decision not to offer him a contract was motivated by retaliation in violation of Title VII. *Hicks,* 113 S. Ct. at 2749. For the following reasons, this Court concludes Plaintiff has met this burden.

Evans presented persuasive evidence at trial that he consistently met requisite performance standards over the course of his three years at Southeast High School, as reflected by the Teacher Performance Evaluations introduced by Plaintiff into evidence, including his Evaluation for the period from November 19, 1990, through January 11, 1991, just two months before he was requested to submit weekly lesson plans based on alleged inadequacies, and only three months before he was notified his contract would not be renewed due to poor planning and classroom management. Further, Evans introduced the

testimony of witnesses present at Cooper's first developmental staff meeting where Plaintiff took exception to several of Cooper's remarks as racially insensitive and openly criticized them as such during the meeting. These witnesses testified that Cooper seemed extremely annoyed and agitated in his reaction to Evans, allegations that his visions and plans for the students and staff were racially insensitive. In light of these facts, this Court further finds the closeness in time between Plaintiff's complaints and the institution of Cooper's campaign of "reprimands," which ultimately resulted in failure by the School District to rehire, is persuasive evidence of the alleged retaliation. Accordingly, this Court **CONCLUDES**, as did the jury in the 42 U.S.C. § 1981 and MHRA claims, that Evans ultimately has proved that reprimands by Cooper, as well as the ultimate decision not to offer Plaintiff a new contract, were both motivated by retaliation.

Accordingly, Plaintiff is entitled to judgment in his Title VII retaliation claim. This Court finds, however, the jury's award of $25,000 for actual damages, including back pay, is sufficient monetary relief for the School District's unlawful discrimination and thus no additional monetary relief is granted under Title VII.

V. RELIEF

Evans has requested relief from the School District in the form of (1) reinstatement; (2) a permanent injunction enjoining the District from continuing to discriminate against Plaintiff because of his race or in retaliation; (3)

compensatory damages; (4) back pay; (5) punitive damages; and (6) attorney's fees.

As a preliminary matter, Title VII of the Civil Rights Act of 1964, as amended,[4] states in pertinent part:

> If the court finds that respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement.

42 U.S.C. § 2000e-5(g). A district court is vested with sound discretion to decide whether to award reinstatement as equitable relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981). To the extent possible, a district court should seek "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle*, 422 U.S. at 418. Reinstatement is such a basic element of Title VII relief that granting such relief is presumed appropriate and, except in extraordinary cases, is required. *Weaver v. Casa Gallardo Inc.*, 922 F.2d 1515 (11th Cir. 1991); *Darnell v. Jasper*, 730 F.2d 653 (11th Cir. 1984).

Further, a court may refuse equitable relief, including compelling employment of plaintiff, " 'only for reasons

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[4] The 1991 amendments to the Civil Rights Act were not effective until after Plaintiff's employment with the School District was terminated and therefore are not applicable to this case.

which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' " *Albemarle*, 422 U.S. at 421. Accordingly, a district court *must "carefully articulate" its rationale for* refusing to compel employment of a plaintiff who has suffered discrimination. 422 U.S. at 421, n.14.

Notably, those cases in which courts have declined to reinstate injured plaintiffs have frequently involved high level and unique positions or evidence of extreme animosity between plaintiff and defendant employers. *See, e.g., Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982) (holding plaintiff and defendant employer could no longer exist in a productive business relationship); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355 (D.N.H. 1981) (concluding reinstatement of plaintiff "would be a harbinger of disaster"); *Combes v. Griffin Television. Inc.*, 421 F. Supp. 841, 846 (W.D. Okla. 1976) (finding discord, tension, suspicion, antagonism and sensitivity would create a very difficult employment environment if plaintiff were reinstated); *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd. mem.* 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977) (plaintiff's former job "required a close working relationship [with] top executives of defendant" and "involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative").

It appears to this Court that reinstating Plaintiff as a teacher does not involve a high level or unique position within the School District. Further, now that Cooper is no

longer employed by the School District, the likelihood that extreme animosity between Plaintiff and Defendant would exist upon reinstatement is remote.[5] Accordingly, in the attempt to make Plaintiff whole for injuries suffered on account of unlawful employment discrimination, the School District shall rehire Plaintiff to his former position, or one that is equivalent to the position, of high school music teacher.[6]

Plaintiff also requests the Court to enjoin the School District from continuing to discriminate against Plaintiff because of his race or in retaliation. Injunctive relief generally should be granted in Title VII cases unless there is no reasonable expectation that the discriminatory conduct will recur, *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), or if interim events have "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Notably, Cooper is no longer employed by the School District. Based on Cooper's departure, this Court concludes that there is no reasonable expectation that the discriminatory conduct will recur when Evans is once

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[5] Friction arising from the litigation process itself is not sufficient enough to deny employment since "a court might deny [employment] in virtually every case if it considered the hostility engendered from litigation as a bar to relief." *Taylor*, 648 F.2d at 1139.

[6] For other decisions compelling reemployment, see *Taylor*, 648 F.2d at 1139; *Harper v. General Grocers Co.*, 590 F.2d 713 (8th Cir. 1979); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Cline v. Roadway Express, Inc.*, 689 F.2d 481 (4th Cir. 1982).

again employed by the School District. Consequently, Plaintiff is denied injunctive relief.

Although compensatory damages have been requested by Plaintiff, this Court, as did the jury on Plaintiff's Section 1981 and MHRA claims, finds Plaintiff failed to present sufficient evidence of mental anguish, humiliation, embarrassment and stress to justify more than a nominal award of $1.00 for compensatory damages. As a result, this Court finds the jury's award for compensatory damages is sufficient relief.

Plaintiff also requests punitive damages in his Amended Complaint. It is well settled that, prior to passage of the Civil Rights Act of 1991, punitive damages were not available to a Plaintiff seeking redress under Title VII, regardless of whether the defendant was a governmental entity. Because the 1991 amendments to the Civil Rights Act were not effective until after Plaintiff's employment with the School District was terminated, *see Lee v. Trans World Airlines. Inc.*, 509 F. Supp. 1182, 1186 (W.D. Mo. 1981), punitive damages are not available to Plaintiff in his Title VII claim.

Lastly, a prevailing party in an action brought under Title VII may be awarded attorney's fees in the Court's discretion. 42 U.S.C. § 2000e-5(k). While discretionary language is used in the statute, prevailing plaintiffs are essentially entitled to attorney's fees unless special circumstances would render such an award unjust in light of Congressional goals underlying enforcement of fee awards in civil rights litigation. *Lyte v. Sara Lee Corp.*, 950 F.2d 101 (2d Cir. 1991). No such circumstances exist in

this case. Plaintiff's counsel, therefore, is required to submit an application for reasonable attorney's fees within twenty days of the date of this Order.

Accordingly, it is hereby ORDERED that

1) judgment be entered in favor of the Plaintiff on the issue of liability on his Title VII claim (Count I);

2) Plaintiff shall be reinstated to the position of music teacher in the Kansas City, Missouri School District, or some other similar position;

3) Plaintiff shall submit a request for fees within twenty days of the date of this Order to which the Defendant shall file a response within five days of the date that request is filed; and

4) the Clerk of the Court is directed to enter judgment in this matter pursuant to Rule 58 of the Federal Rules of Civil Procedure on Counts Two and Three.

IT IS SO ORDERED.

/s/ Elmer B. Hunter
SENIOR U.S.
DISTRICT JUDGE

DATED: 8-25-94

Supreme Court U.S.
FILED
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CLERK

No. 95-1170

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

WILLIAM EVANS,

Petitioner,

V.

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Title VII protect an employee's opposition to employer actions required by a federal court desegregation order?

2. Is an employment retaliation claim brought under 42 U.S.C. § 1981 subject to the same analysis as a Title VII employment retaliation claim?

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COUNTERSTATEMENT OF THE CASE

A. Background

On or about August 30, 1988, plaintiff William Evans, an African-American, was employed by the School District of Kansas City, Missouri (the "School District") as a "probationary" music teacher assigned to Southeast High School, one of nine high schools in the School District. Evans was responsible for teaching band and choir classes.

Pursuant to statutes applicable to Missouri public schools, teachers are classified as probationary until they have completed five years of teaching and have then been employed for a sixth consecutive year, at which point they become "permanent," or tenured, teachers. Probationary teachers in Missouri public schools receive one-year contracts, subject to annual renewal; permanent teachers' contracts renew automatically each year.

At the time Evans was hired, the School District was subject to a desegregation order entered by the

Federal District Court for the Western District of Missouri in Jenkins v. State of Missouri, No. 77-0420-CV-W-4. The initial remedial order in Jenkins, reported at 639 F. Supp. 19, was entered in 1985. A subsequent order, entered November 12, 1986, approved an extensive program of "magnet schools" as a part of the desegregation remedy.

At the time the remedial desegregation orders were entered, Southeast High School enrolled a more than 90 percent African-American student body drawn from its surrounding racially segregated geographic area. Under the desegregation plan, Southeast High was to become a magnet school, intended to attract a racially diverse voluntary student enrollment from a broad geographic area. Under the plan, teachers and other staff of each magnet school were to participate in recruiting voluntary student enrollment which would meet established goals of racial diversity at each school. Schools which were predominately non-minority were to concentrate on

recruitment of minority students; schools which were predominately minority were to concentrate on recruitment of non-minority enrollment.

In January of 1991, during Evans' third year as a probationary teacher, a new principal, Dr. Curtis Cooper, was hired to implement the magnet programs at Southeast High School. Cooper was hired on the basis of his background and experience in leading magnet school programs.

Consistent with the requirements of the desegregation plan, Cooper planned to implement an educational program related to the magnet themes, to improve academic achievement at the school, and to recruit racially diverse student enrollment from a broad geographic area.

Realizing that some members of the school's staff opposed the changes required under the desegregation order, Cooper arranged for a special staff meeting to be

held in February of 1991, soon after he assumed his position. At this first meeting with the entire staff of the school, Cooper sought to communicate his vision and goals in implementing the desegregation plan at Southeast High. He specifically addressed the need to recruit non-minority students to achieve the goals of desegregation set out in the plan, and the plan's expectation that the entire staff of the school would participate in non-minority student recruitment.

All members of the staff were given the opportunity to respond to Cooper's remarks. Petitioner Evans used the opportunity to criticize Cooper's proposals, including the focus on non-minority recruitment. Evans charged that Cooper's proposals totally disregarded the current 98 percent black student population attending the school. Evans referred to the plan as "nothing more than a tool to further alienate the student population from its rich and historic culture."

During the two and one-half years prior to Cooper having assumed his duties as principal at Southeast High, three scheduled evaluations of Evans had been performed, one by a previous principal of Southeast High School, one by a coordinator of instruction, and one by an assistant principal. Although each of these evaluators had recommended Evans' continued employment as a probationary teacher, evaluations for the second two years were below those of the first year, the scores were in the mid-range required for meeting performance standards, and each evaluation included comments indicating need for improvement in Evans' teaching skills.

A part of Cooper's role as educational leader of Southwest High School was visiting classrooms to observe the quality of instruction. According to Cooper's testimony, he became concerned, based on his observations of Evans' classroom teaching, that students in Evans' band class were not engaging in musical

performance to the extent Cooper believed necessary for successful learning. Cooper testified that he had also become aware that under Evans' direction and instruction, the band's reputation was poor -- so poor that the band was not invited to perform for school activities.

Rather than relying solely on his own views of Evans teaching skills, Cooper contacted the School District's coordinator for performing arts, Dr. Irving Phillips, to assist in assessing the adequacy of Evans' classroom instruction. After classroom observation, Dr. Phillips found Evans' instruction to be seriously deficient, with no demonstrable evidence that music instruction was occurring in the classroom.

According to Cooper's testimony, this second opinion verified his view that Evans required help in improving his instructional performance. Cooper directed Evans to submit long-range and weekly lesson plans. Evans submitted a long-range plan, but refused to provide

short range plans, noting by memorandum to Cooper that he did not "feel obligated" to submit a weekly lesson plan, because such a directive had not been made to the entire staff.

Cooper advised Evans that he considered the refusal to submit weekly lesson plans insubordination. Evans thereafter requested a meeting of Cooper, Evans, and the School District's collective bargaining representative for teachers. The meeting was held in March of 1991. Cooper assessed Evans' manner at the meeting as disrespectful, considering it further evidence of insubordination.

Each spring, prior to an April 15 statutory deadline, building principals in the Kansas City School District are required to forward employment recommendations to the School District's central administration. In his 1991 report, Cooper recommended that Evans' contract as a probationary teacher not be renewed. This

recommendation was approved by the School District's central administration and forwarded to the school board. On or about April 11, 1991, the Board of Directors of the School District approved the administration's recommendation. Evans' contract was not renewed, and his employment terminated at the end of the 1990-91 contract year.

B. Proceedings Below

Evans filed an action in the Federal District Court for the Western District of Missouri, alleging that the School District subjected him to race discrimination and unlawful retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 et seq.. The retaliation claim was based on allegations that as a result of his criticism of Cooper's implementation of the magnet plan at Southeast, Evans was required to submit instructional lesson plans on a more frequent basis than

other teachers. Evans' race was alleged to be the basis for the School District's decision not to renew his contract. The State law and § 1981 claims were submitted to a jury and the Title VII claims reserved for ruling by the Court.

Evans testified that he believed he suffered employment retaliation because of his opposition to Cooper's plans to focus on recruitment of non-minority students, and his criticism of Cooper's reference to "Camelot" as the ideal for Southeast High School.

Following a four day trial and two days of deliberation, the jury found in favor of the School District on the race discrimination claims, and in favor of Evans on the retaliation claims. The District Court adopted the factual findings of the jury, ruled in favor of the School District on the claims of race discrimination in violation of Title VII, and ruled in favor of Evans on the claim of retaliation under Title VII. Evans was awarded a total of $25,002 in damages, and reinstatement to a teaching

position. Evans v. School Dist. of Kansas City, Mo., 861 F. Supp. 851 (W.D. Mo. 1994).

The School District appealed that portion of the judgment holding in favor of Evans on his claim of retaliation. On September 6, 1995, the United States Court of Appeals for the Eighth Circuit reversed, remanding the case to the district court with directions to dismiss the complaint. The Court of Appeals held that Evans' retaliation claim should have been dismissed as a matter of law, because he had failed to show a good faith reasonable belief that his employer had engaged in a discriminatory employment practice, an essential element of an employment retaliation claim brought under 42 U.S.C. § 2000e-3(a) or 42 U.S.C. § 1981.

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the Eighth Circuit correctly applied settled legal principles in holding that a retaliation claim under Title VII, Section 1981, or the Missouri Human Rights Act cannot be based on allegations of retaliation for opposing employer actions which could not reasonably be considered unlawful.

The requirement that an employee claiming retaliation show a reasonable belief that the employee was opposing unlawful employer actions applies to actions brought under Title VII, Section 1981, or the Missouri Human Rights Act. All actions Petitioner opposed were taken pursuant to desegregation orders entered by a federal district court. Petitioner was aware of the desegregation plan requirements, and could not reasonably have believed that the School District was acting

unlawfully in complying with the requirements of the court order. He therefore failed, as a matter of law, to establish one of the basic elements of an employment retaliation claim.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT A CAUSE OF ACTION BROUGHT UNDER TITLE VII'S PROHIBITION AGAINST EMPLOYER RETALIATION REQUIRES A SHOWING OF A REASONABLE BELIEF THAT THE EMPLOYER ENGAGED IN ACTS MADE UNLAWFUL BY TITLE VII.

In an effort to obtain Supreme Court review, petitioner Evans has misstated the basic holding of the Eighth Circuit in dismissing Evans' Title VII retaliation claim.

The Eighth Circuit's decision on Evans' retaliation claim was based on the Court's conclusion that Evans had failed, as a matter of law, to establish the basic elements of an employment retaliation cause of action. The Court concluded that Evans had failed to demonstrate that he suffered retaliation as a result of having engaged in protected opposition to his employer's actions, in that he failed to allege or prove facts showing "a good faith

reasonable belief that his employer engaged in a discriminatory employment practice." (Petitioner's Appendix, at 5):

> Doctor Cooper's announced course of action with respect to the magnet school program reflected his intention to comply with the district court's desegregation order. Evans was aware of the desegregation order and magnet program, and thus he cannot avoid scrutiny of his claims by relying on an asserted reasonable belief that his allegations were justified. To the extent that Evans claims a belief that he and the rest of the staff would be required to discriminate, such a belief was simply unfounded and unreasonable in the light of the district court's sweeping desegregation order. Evans could not reasonably believe that the faculty would be excused from complying with a lawfully required directive.

It is well-settled law that Title VII protects an employee's opposition only to employment practices which the employee reasonably and in good faith believes violate Title VII. Sisco v. J.S. Alberici Const. Co., 655 F.2d 146, 150 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Meeks v. Computer Associates Intern., 15 F.3d 1013 (11th

Cir. 1994); Holden v. Owens-Illinois, Inc., 793 F.2d 745 (6th Cir. 1986), cert. denied, 107 S. Ct. 649; Crowley v. Prince George's County, Md., 890 F.2d 683 (4th Cir. 1989); Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312 (6th Cir. 1989).

The conduct that Evans opposed consisted of the following statements made by Dr. Cooper in the February 1991 staff meeting at Southeast High School:

(1) Dr. Cooper spoke of the magnet plan and the need to recruit non-minority students to attend Southeast High School to achieve the desegregation objectives of the magnet plan. (Trial Transcript V. II, p. 111, l. 18; p. 112, ll. 1-15; V. I, p. 43, ll. 1-8).

(2) Dr. Cooper indicated that teachers were expected to assist the School District in attracting non-minority students. (Trial Transcript V. I, p. 44, ll. 10-22).

(3) Dr. Cooper made some reference to Southeast becoming "a realization of the fictionalized Camelot." (Def. Trial Ex. 25).

The Eighth Circuit was clearly correct in concluding that the genesis of Evans' claims lay not with any allegedly discriminatory employment practice, but rather with an allegation that a desegregation directive and Cooper's efforts to comply with it, disregarded the needs of the black student population of Southeast High School. The Court found that while Evans might disagree with the provisions of the federal court's desegregation order, he could not have reasonably believed that Principal Cooper's plans for complying with the order constituted a discriminatory employment practice. An employee's unreasonable belief that an employer's actions are discriminatory does not trigger protection of anti-retaliation laws. Sisco, 655 F.2d at 150; Booker, 879 F.2d at 1313.

Even if the jury believed, as it apparently did, that Principal Cooper's criticisms of Evans and requirements that Evans submit daily lesson plans resulted from anger

at Evans' opposition to Cooper's plans for implementing the magnet program at Southeast rather than from sincere concerns about Evans' need to improve his teaching methods, this did not establish the necessary elements of an employment retaliation claim. Principal Cooper's plans for implementing the desegregation plan were lawful. They were not in violation of any provision of Title VII, § 1981, or the Missouri Human Rights Act. Petitioner Evans' opposition to Cooper's actions was, therefore, not protected by Title VII, § 1981, or the Missouri Human Rights Act.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT PLAINTIFF FAILED TO ESTABLISH AN EMPLOYMENT RETALIATION CLAIM UNDER 42 U.S.C. § 1981.

Petitioner again resorts to distortion of the Eighth Circuit opinion in an effort to establish error in the court's ruling that Evans failed to establish an employment

retaliation claim under 42 U.S.C. § 1981. In this instance, Evans claims that the decision below "holds that protection under 42 U.S.C. § 1981 does not extend to a Black employee complaining of racial discrimination directed at others who are not fellow employees."

What the Eighth Circuit decision in fact does is hold that Evans' § 1981 retaliation claim fails because it is subject to the same analysis as Title VII claims. (Petitioner's App. 6). The Court states its conclusion that Evans failed to satisfy the requirements of § 1981 in regard to his complaints of employment discrimination "in the same manner that he has failed to satisfy Title VII and the Missouri Human Rights Act," because he did not allege or prove facts showing he had engaged in protected activity in that there was no basis for a reasonable belief that actions had been taken by his employer which were unlawful under Title VII or § 1981. The court correctly held that the elements of a claim of employment

discrimination under Title VII and § 1981 are identical. See Patteson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Anderson v. Douglas & Lowanson Co., Inc., 26 F.3d 1277, 1284 M.7 (5th Cir. 1994); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981); Sweeney v. City of Ladue, 25 F.3d 702, 703 (8th Cir. 1994).

The opinion then discusses Evans' argument "that section 1981 is broader and encompasses actions that do not fall within the rubric of the employment relationship." (Petitioner's App. 6, emphasis added.) This discussion notes that to the extent Evans is attempting to assert a right to bring a § 1981 claim on the basis of any alleged damage other than the damage he claims to have suffered as an employee -- a claim other than the failed employment retaliation claim -- he has no standing to do so, because he can assert a claim only on the basis of his own damages, not on the basis of damages suffered by

others. This statement merely acknowledges basic rules of standing. Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100, 60 L.Ed.2d 66 (1979); Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421-22 (4th Cir. 1984).

Additionally, although not discussed in the Eighth Circuit opinion, even if the necessary elements of a prohibited retaliation claim had been met, Evans' 42 U.S.C. § 1981 claim against the School District could not have served as the basis for the damages awarded by the District Court. Section 1981 does not provide an independent federal damages remedy for discrimination by local governmental entities.

This Court has specifically held that 42 U.S.C. 1983 provides the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the alleged violation is by a state entity. Jett v. Dallas Independent School District, 491 U.S. 701, 733 (1989). The School

District, a state entity, could not be subject to damages under § 1981 on a theory of respondeat superior, the theory pursued by petitioner.

III. THE EIGHTH CIRCUIT'S DECISION IS IN HARMONY WITH DECISIONS OF OTHER CIRCUITS AND HOLDINGS OF THIS COURT.

Petitioner's claims that the Eighth Circuit's decision is in conflict with decisions of other circuits and that it "undermines traditional civil rights protection" also flow from his distortion of the Eighth Circuit holding. None of the cases cited by Petitioner are in conflict with the Court's actual holding.

A. The Eighth Circuit's Ruling Does Not Conflict With Rulings Of Other Circuits Regarding The Elements Of A Cause Of Action Based On Employment Retaliation.

Petitioner has identified no decision which is in conflict with the Eighth Circuit's holding that Title VII

requires a showing of a reasonable belief that an unlawful employment action has occurred. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984), the case cited as establishing a conflict, does not deal with this issue.

In Wrighten, the Ninth Circuit had not been called upon to determine whether an unlawful employment practice had occurred. The trial court's finding that an unlawful employment practice had occurred was not challenged on appeal:

> In this action the trial court assumed without proof that Wrighten directed her opposition at unlawful employment practices at Emannuel Hospital.

726 F.2d at 1355.

The question before the Ninth Circuit was whether Wrighten's activities in opposition to an unlawful employment practice were so unreasonable as to exceed

the protection afforded by § 2000e-3; whether the employee's means of opposition to an unlawful employment practice was so extreme as to exceed the protection of Title VII. The trial court had denied the claim on the basis of the unreasonableness of the plaintiff's activities; the Ninth Circuit reversed, holding that the nurse's opposition activities did not go so far as to exclude her from § 2000e-3's protection.

The Eighth Circuit holding at issue herein does not address the reasonableness of Evans' means of opposition; it deals with whether the opposition was directed at an unlawful employment practice. The two decisions are not in conflict.

B. The Eighth Circuit's Denial Of Petitioner's Claim Under 42 U.S.C. § 1981 Was Consistent With Established Law.

Nor is the Eighth Circuit's denial of Evans' 42 U.S.C. § 1981 claim in conflict with the cases relied on by petitioner. In DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975), the plaintiff had been forced into retirement because he had sold his house to a black fellow-employee. 511 F.2d at 312. The employer had engaged in an action which was unlawful under § 1981 -- refusing to allow a black employee to make a contract similar to that allowed to white employees -- and the complaining employee had been directly damaged because of his action in opposition to this unlawful act of the employer. The white plaintiff had been denied standing based on the trial court's holding that a white person did not have standing to sue under § 42 U.S.C. 1981. Evans raises no such issue. The decision is not in conflict with DeMatteis.

Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975), and Sullivan v. Little Hunting Park, 396 U.S. 220, 90 S. Ct.

400. 24 L.Ed.2d 386 (1969) are also inapposite to the Eighth Circuit decision in this case. In Faraca, a white plaintiff was denied employment because he was married to a black woman. He had standing to raise a claim under 42 U.S.C. § 1981 because he had been denied a right guaranteed by § 1981; the right to contract. He personally suffered direct damage as a result of the employer's racially discriminatory action toward him. The Evans decision is not inconsistent with Faraca.

In Sullivan, the plaintiff was granted standing to bring an action under 42 U.S.C. 1982 after he suffered damage for trying to vindicate rights of minorities which had been violated by actions made unlawful under 42 U.S.C. 1982. This Court held that Sullivan had standing to sue even though he was not the direct victim of the discriminatory practice, because the direct victims would otherwise have had no way to vindicate their rights.

Sullivan is not applicable to the facts or to the holding of the Evans case. The students whose rights Evans claims to have been trying to protect are members of the plaintiff class in Jenkins. The students and their parents are unquestionably more appropriate advocates of their rights than Evans. They not only have a means to vindicate these rights, they are part of a class action in which the proper means of vindicating their rights is an issue in ongoing litigation.

The Eighth Circuit's denial of Petitioner's 42 U.S.C. § 1981 claim is not inconsistent with this Court's decision in Sullivan.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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